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In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

THE STATE OF CALIFORNIA, *et al.*,
Respondents,

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

HONORABLE MARTIN PENCE,
Respondent.

BRIEF IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit or, in the alternative, Motion for Leave to File Petition for a Writ of Prohibition or Mandamus and Petition for a Writ of Prohibition or Mandamus.

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QUESTION PRESENTED

Petitioner has incorrectly stated the question which it seeks to have this Court review. A more accurate statement of the question is:

> Whether this Court will review an Order which proposes, but does not establish with finality, trial dates in related antitrust cases pending in several District Courts, where the

District Judge to whom the cases have been assigned has closely supervised pretrial proceedings for a period exceeding three years, and is familiar with the status of the cases and with most of the evidence which is to be proffered by the parties.

STATEMENT OF THE CASE

This Petition stems from 27 separate civil antitrust suits which were filed and are now pending in five United States District Courts in California, Oregon and Washington. The cases were filed during late 1964 and early 1965. The Plaintiffs, which number approximately 350, are municipalities and other public entities.

Petitioner is the sole defendant affected by the Question raised in the Petition. An individual is named as a defendant in two of the actions; but both of these actions are filed in a single District.[1] These cases will doubtless be consolidated. There is nothing in the Record to indicate that the individual will be involved in more than one trial.

Pursuant to 28 U.S. § 291(c), all of these cases were assigned to Judge Martin Pence, a Respondent herein; and since March 1965 extensive discovery and other pre-trial proceedings have been conducted under the supervision and at the direction of Judge Pence. The cases have not as yet been consolidated for any purpose, but the pre-trial proceedings, including discovery, in all cases, have been conducted jointly and simultaneously.

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1. These actions are: *San Jose Water Works vs. American Pipe and Construction Co.*, N.D. Cal. No. 43752; *California Services Co. vs. American Pipe and Construction Co.*, N.D. Cal. No. 43753.. The individual defendant has not been served and was not a party in the Court of Appeals. No question concerning the individual defendant was raised in the Court below.

It is not expected, obviously, that Judge Pence must conduct the trial of all of these 27 cases, even if the number of trials should be reduced by consolidation. The various Orders and other proceedings since November 1966 contemplete, at least for the time being, trials in three Districts, conducted by three separate District Judges, including Judge Pence. It is expected that each trial will dispose of some or all of the actions pending in or transferred to the District of trial, pursuant to appropriate Order for consolidation. No designation has yet been made of the cases to be consolidated, the Districts in which the trials shall be conducted, or the District Judge who shall preside in each trial. It is contemplated, however, that Judge Pence will conduct a trial and that trials will be conducted by Judge Alfonzo Zirpoli (N.D. Calif.) and Judge George Boldt (W.D. Wash.).

No objection is raised by Petitioner to the consolidation of cases for three trials, or to the proposal for assignment of Judge Zirpoli and Judge Boldt to preside at two of the trials. Nevertheless, Petitioner urges in its Statement of the Case that "one consolidated trial would best serve the interests of justice and judicial economy." (Pet. p. 4) If Petitioner intended this to be part of its argument, we think, as did Judge Pence (R. p. 274), that no response is required other than to invite the Court's attention to the obvious impracticality of trial by jury of 27 consolidated antitrust damage actions involving approximately 350 separate Plaintiffs.

Judge Pence is unique in his knowledge of the pre-trial proceedings in these cases. He has conducted pre-trial hearings almost monthly since

March 1965. He has read some or all of the depositions which will be offered to prove the alleged conspiracy. He has entered Orders designed to expedite trial proceedings, such as (for example) an Order directing the marking of portions of depositions to be read, together with written objections to be raised at the trial. He has required the parties to prepare and submit detailed trial memoranda containing summaries of both fact and law. At his direction, proposed Jury Instructions and *voir dire* questions have already been submitted. Judge Pence and his Administrative Assistant have conferred with the expert witnesses of Plaintiffs and Defendant on the subject of Damages (involving, in these cases, sophisticated computer programs) so that the trial Judges may better understand and make rulings concerning the Damage theories of the parties. He has had an opportunity to observe the number and assess the competence of Petitioner's staff of attorneys. These details of Judge Pence's attention to these cases are only illustrative; but they demonstrate that he is peculiarly competent to estimate the length of the coming trials and to evaluate the problems, both theoretical and practical, which require solution.

The question of trial dates was first discussed by Judge Pence in a letter dated November 28, 1966. (R. p. 244). In the letter, Judge Pence proposed that discovery in all cases be conducted simultaneously; and he remarked that this would result in all cases being ready for trial at the same time. He further stated that he was "considering . . . holding practically simultaneous trials" in Seattle, San Francisco, and Los Angeles.

At the next Pretrial Hearing, held on December

14, 1966, Mr. Jansen, principle counsel for Petitioner, discussed the Court's proposal for trial dates. Assuming, apparently, that the proposal meant that the Court intended to set all the trials for commencement on the same date, Mr. Jansen stated (R. p. 246):

> "If I understand your Honor's suggestion, it is that Pre-Trial proceedings and trials proceed simultaneously in Seattle before Judge Boldt, here in San Francisco before Judge Zirpoli and in Los Angeles before your Honor."

To this, Judge Pence replied (R. p. 246):

> "You haven't stated it quite exactly as it is, but you proceed with what you have to say."

Mr. Jansen went on to state (R. p. 248):

> "I personally and no one but me is going to try every one of these cases . . ."

A few moments later, the following colloquy took place between the Court and Mr. Jansen (R. p. 250):

> "MR. JANSEN: Well, I hope your Honor understands that I am not here to challenge anything. I am here this morning to plead with your Honor to give serious consideration to my situation and not split me up into three persons.
>
> THE COURT: Well, as I have listened to the basis of your situation, it appeared purely financial; namely, that you had recommended to the company that you now represent with some thirty-five million dollars in assets—and I assumed that that is net—that they were spending a half a million dollars a year and all I can say is any firm with thirty-five million dollars can afford to have more than one, two or three lawyers represented in these cases here.

MR. JANSEN: There were other considerations besides financial.

THE COURT: Undoubtedly there were but you mentioned financial. When I look at the financial—you see, actually, I feel by the means which this court and this circuit is adapted to trying to move all cases forward, we have as a matter of fact saved your company as well as some of the other defendants perhaps more than a half million dollars, because it would have been necessary for you to have counsel practically in every district where these cases could be tried and that has been—

MR. JANSEN: I understand, your Honor."

The concept of conducting more than one trial at approximately the same time did not originate with the Plaintiffs. Judge Pence explained its origin in a colloquy with Mr. Jansen at the pretrial hearing on February 3, 1967. The Court stated (R. p. 270-272):

"Mr. Jansen, in order to make sure that the record is straight, the purpose of the three-judge idea could not have been to clobber the defendants or yourself in submission because the purpose behind the three-judge, three-trial idea was to give justice to all parties, as the judge who proposed that idea—not counsel—felt it would bring justice to all.

The idea of simultaneous trials did not come from Mr. Blecher or any one plaintiff. The idea of the three simultaneous trials came rather from the experience of this judge, from the experience of Judge Robson, the experience of Judge Becker, the experience of Judge Boldt and from the other judges throughout the United States who had observed in the electrical cases a situation which resulted, when the cases were set for trial, one to follow another—one of the results which was ob-

served by the National Coordinating Committee on complex and multiple litigations especially set up for the electrical cases, was that the defendants were able to "pick off" the lesser plaintiffs whose cases were not moved forward into early trial.

* * *

Further study of the problem by the Court with the aid and assistance, as I say, of the judges on the National Coordinating Committee, led this court to the ultimate conclusion that the court, of its own volition, indicate to counsel that it felt that the only way in which these cases could be handled with fairness to the plaintiffs and fairness to the defendants and fairness to the public would be to have preparation of all cases for simultaneous trial with the idea that if any were settled out the remaining cases could be handled quickly and expeditiously thereafter.

So, to repeat, the idea of preparation for simultaneous trial was not one which was brought out and brought forth by the counsel for the plaintiffs, but rather brought forth by this judge after long study, as the record will show, after severe visceral disturbances brought upon final intellectual analyses of the whole posture of all of the cases, with the result heretofore indicated."[2]

After the above statement, Judge Pence entered Pretrial Order No. 9, dated February 21, 1967. Contrary to the apparent assumption of Petitioner, Pretrial Order No. 9 contains no provision for commencement of three trials at the same or approximately same time. The Order provides for a con-

2. Mr. Jansen's response to the Court's comment was to suggest that all the cases be tried at once in one trial. (R. p. 276.)

The factors which influenced the decision of Judge Pence to schedule three trials commencing at approximately the same time were set forth in his *Amicus Curiae* Brief, p. 13-17, in the Court of Appeals.

ference of three District Judges and further provides for the selection of "not less" than three cases for separate trials, for the designation of the Districts in which such trials will be held and for the designation of the Judge who will preside in each district.

Respondents never assumed that this Order meant that three trials would commence precisely at the same time. Respondents did assume that since the cases would be ready for trial at or about the same time, the trials would commence at about the same time, depending upon the convenience and calendar of the designated Judges and other considerations which would expedite the fair disposition of this large group of cases.

Petitioner, however, in the District Court as well as in the Court of Appeals, treated Pretrial Order No. 9 and subsequent Orders, as if they would require the commencement of three trials at exactly the same time.

Pretrial Order No. 10, Pretrial Order No. 11 and Pretrial Order No. 13 related to completely different subjects and contained no provision concerning designation of Judges or Districts, and nothing concerning a trial schedule.

Pretrial Order No. 12 and Pretrial Order No. 14 did contain paragraphs concerning designation of Judges and Districts similar to that contained in Pretrial Order No. 9, except that the date of the pretrial conference to consider these matters was postponed in each Order.

The proceedings which culminated in the Petition now before this Court commenced with a Notice of Appeal from Pretrial Order No. 14. The Notice was dated December 26, 1967. Like Pretrial Orders No.

9 and 12, it provided for a conference of Judges, but contained nothing concerning commencement of trials, except a provision that the trials would commence "at such time as the presiding judge shall determine" (Pet. p. 5-6).

While these cases were pending in the Court of Appeals, Pretrial proceedings in the District Court continued; and before submission of final Briefs and argument, Judge Pence, on February 26, 1968, entered Pretrial Order No. 15. That Order provided for a Pretrial conference to be held on June 5, 1968 (subsequently postponed to August 7, 1968) to be attended by Judge Pence, Judge Alfonzo Zirpoli, and Judge George Boldt. The Order then recited that:

> "At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968 [subsequently postponed to August 7, 1968], and *with each succeeding trial to commence thereafter at intervals of not less than two weeks each;* and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges." (Italics supplied)

It is the above Order which was ultimately considered by the Court below and challenged by the

Petition now before the Court. (Opinion below, p. 5).

Pretrial Order No. 15 was changed slightly by Paragraph 31 of Pretrial Order 16, and by Paragraph 27 of Pretrial Order No. 17, entered on May 28, 1968. The latter Orders contained changes in dates; and instead of providing that "not less than three" cases for separate trial, they provided that Judge Pence

> ". . . will (A) select the case(s) for trial; (B) select the district(s) in which any such trial(s) will be held."

Both Orders then provided for a final Pretrial order

> "setting such cases for trial at such times as will permit the orderly processing of overlapping trials, with the first trial to commence no later than September 3, 1968 [Par. 27, Pretrial Order No. 17], and with any succeeding trial to commence thereafter at intervals of not less than two weeks each; . . ."

Pretrial Order No. 17 is the last of a long series of Orders and other proceedings designed to bring these cases to trial.

The present status of the cases, therefore, is this: A Pretrial conference will be held on August 7, 1968; at that time a cases or cases will be set for trial on or before September 3, 1968, in some District or Districts; if more than one trial is scheduled, the trials may overlap, but no trial will commence less than two weeks following commencement of the next preceding trial.

SUMMARY OF ARGUMENT

The individual defendant referred to in the Petition is not affected by the challenged Order. The two cases in which he is named as a defendant are pending in a single District. There is no indication that he will be involved in concurrent or overlapping trials. He is not a Petitioner and the question of how concurrent trials might affect him, if at all, was not submitted to or decided by the Court below.

All of the cases have become ready for trial at the same time. It is impossible for one Judge to try them all. The Judge who will initially determine the trial dates is thoroughly familiar with the status of the cases.

The orderly administration of Justice requires multi-trials which may, to some degree not determined, involve concurrent trial proceedings.

But there is no showing that Petitioner will be prejudiced by trials which are partially concurrent or overlapping. The assertions of possible prejudice are based on speculation. And the District Judges to whom the cases are to be assigned for trial can protect Petitioner from prejudice because each trial Judge controls his own calendar. The Petition is therefore premature.

Petitioner has known since November 1966 that three or more trials might be required and that the trials might partially overlap. The Pretrial proceedings have resulted in unusually thorough preparation which will permit this without prejudice to the parties. There is no showing that Petitioner's large staff of attorneys can not competently conduct trials which might be partially con-

current. Lack of diligence on the part of Petitioner's attorneys which might make the procedure difficult or inconvenient provides no ground for interference with the orderly administration of Justice.

No facts warrant the conclusion or assumption that the orderly presentation of evidence will be hampered by trials which may partially overlap.

This Petition is based mainly upon the demand of one attorney for the right to conduct the trial of all cases. Petitioner has no right to insist that one attorney try all of the cases or participate in all trials, especially where, as here, such insistence would result in substantial and unnecessary delay to many Plaintiffs in the trial of cases which have been pending over three and one-half years.

ARGUMENT

I. Important Questions Are Not Presented.

A. No new technique is involved. (Answer to p. 8-12 of Petition).

In these cases, discovery and other Pretrial proceedings were conducted jointly in all actions. As Petitioner concedes, this is familiar procedure, recommended the Federal Judicial Conference and now adopted by statute. The application of this procedure in these particular cases has demonstrated its advantages. These complex cases—multi-party and multi-district in scope—have been brought by the assiduous efforts of Judge Pence to a stage of trial preparation which is rarely accomplished in the simplest of cases.

Neither is the proposed method of trial setting new or unique. Pretrial proceedings having been completed, Judge Pence now proposes that some

of the cases be assigned to other District Judges pursuant to 28 U.S.C. § 137. Once this is done, the cases will be under the control of the Judges to whom they are assigned, and the situation will be the same as if the cases had never been assigned to a single Judge for Pretrial proceedings. As the Court of Appeals stated (Opinion below, p. 7):

> "Moreover, if the further order to be entered . . . provides for substantially overlapping trials, such provision will not be binding upon Judge Pence or any other district judge to whom Judge Pence may transfer some of the cases, since every federal trial judge always retains control of his calendar."

It is true that Judge Pence contemplates overlapping trials and that his initial Order setting trial dates may result in some overlapping of trials, depending on the number of cases consolidated and the many other factors which affect the duration of trials. But these cases are ready for trial; and if at this moment they were pending, ready for trial, before five separate District Judges, we can be assured that the Judges would proceed to set them for trial[3] and that there would be considerable overlapping. And we are equally sure that no District Judge would or should let the cases in his court sit by indefinitely, simply to accommodate the desire of an attorney to try all of several cases, all ready for trial, in five separate District Courts.

However, in these cases, after the assignment to other Judges is made, the trial Judges have the power to modify the trial dates upon a proper and meritous application. Thus, the Court of Appeals stated (Opinion below, p. 7):

3. Rule 40, Federal Rules of Civil Procedure provides: "The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other party or (3) in such other manner as the courts deem expedient.

> ". . . an initial requirement for overlapping trials will be subject to reconsideration by the individual judges up to the dates of trial."

The only new or unique feature of these cases is the demand of one attorney, or one set of attorneys, that he, or they, personally try all of many protracted cases.[4] Such a demand is unreasonable, especially where, as here (*infra,* p. 19), the attorneys are involved in other and unrelated litigation.

B. Under the procedure which is proposed, but not finally established, all parties will be accorded a fair trial. (Answer to p. 13-16 of Petition).

At page 13 of the Petition, it is asserted that Petitioner can not receive a fair trial because of the trial schedule, which has been "ordered." The fact is, however, that no schedule has yet been ordered; and even after an initial order is made, it will be subject to modification before and during trial to insure that all parties will receive a fair trial. (See Opinion below, p. 6-8.) And it is presumptive to contend or assume that a request for a continuance or continuances will risk the "wrath of trial judges and . . . juries."[5] There is no basis for this argument either in the Record in these cases or on general trial principles.

Should trials overlap, no one will be handicapped

4. In the Electrical Equipment cases referred to by Petitioner the defense counsel were engaged *simultaneously* from coast to coast on many fronts: Trials; Court supervised depositions; Appellate proceedings; and miscellaneous pretrial proceedings. At one point, three *simultaneous* involving identical defendants trials were in progress.

5. In the proceedings so far in these cases, Petitioner's attorneys have never demonstrated such solicitude for the equanimity of the District Judge.

by the need for the same document or documents in two or more cases. The parties have already stipulated that copies may be used in place of original documents, and the ease and efficiency of document reproduction is a matter of common knowledge. Moreover, most of the documents which will be offered in evidence relate to damages, and consist of such things as purchase orders and invoices. Documents of this nature will only be required in one District.

The suggestion that there will be a problem about witness availability is without merit. We are not told, and nothing in the Record suggests, what witness or witnesses might be needed in more than one trial. But, in any event, the provision for delay between commencement of trials is designed to meet this problem, should it arise. And the refined state of preparation of these cases, which includes exchange of names of witnesses, permits the trial Judges to arrange the commencement and progress of the trials on a schedule which will avoid any problem of this nature.

In stating that "key persons" might make "crucial" suggestions during trial, Petitioner again asks Court indulge in speculation as to the identity of the "key persons" and the nature of the "crucial" suggestions which could conceivably be required after three and one-half years of intensive pretrial preparation—including exchange of documents, depositions, and detailed trial Briefs.

The argument (Pet. p. 15) that a "time lag" is proposed at the suggestion of Respondents, and for their sole benefit, and that it will not adequately protect Petitioner, is based upon a severe distortion and disregard of the Record. It was always con-

templated that trial commencement dates would be staggered, for the protection of all parties and for the purpose of conducting the trials in an orderly and expedient manner.

In its Statement of the Case (Pet. p. 7-8) Petitioner quotes part of a statement made by Mr. Ferguson (of counsel for Plaintiff-Respondents) during the Pretrial Hearing of September 7, 1967 (R. 280-288). At that time, it was thought that the cases would be ready for trial in about January 1968. In his statement, Mr. Ferguson suggested commencement of a trial on January 22, and commencement of a second trial on February 5. One of the reasons given by Mr. Ferguson for this lag in date of trial commencement was that a witness for Plaintiffs (Dr. Robert Lanzillotti) would thereby have time "between the various cases to prepare his evidence . . ." (R. p. 283). Petitioner, observing that all subsequent Orders include a provision for delay between commencement of trials, state that on the request of Plaintiffs, Judge Pence abandoned the plan of commencing the trials upon the same date and adopted a plan of staggered commencement dates. The implication is that Judge Pence altered his proposal to suit the convenience of Plaintiffs at the expense of Petitioner.

The quoted material, out of context, is misleading and inaccurate; and Petitioner's use of it is unfair and unjustified. Dr. Lanzillotti is the principle damage witness for Plaintiffs. His testimony will be lengthy and relatively complicated. His damage computations will vary, depending on the Plaintiff and purchase transactions. Respondent has repeatedly indicated its intention to vigorously challenge his conclusions, and technical experts as well as legal specialists have been employed to do so.

Without doubt these experts and specialists plan to attend the testimony of this witness, and intend to take time between cases to prepare cross-examination, just as Dr. Lanzillotti will take time to prepare his direct examination. It is well known to everyone connected with these cases that Dr. Lanzillotti is a critical witness, not only for the substance of his testimony, but for timing the progress of the trials. So, any time lag provided for the orderly testimony of Dr. Lanzillotti in all trials will correspondingly benefit Petitioner's witnesses and specialists.

The fact, however, is that no change in the plan for trial schedules resulted from Mr. Ferguson's comment about Dr. Lanzillotti. Judge Pence never directed or contemplated that trials should commence simultaneously or concurrently, in the sense that they should commence on the same day or even in the same week, and the Record warrants no assumption that any change in trial plan resulted from Mr. Ferguson's statement of September 7, 1967.[6] As early as February 3, 1967, Mr. Jansen knew that there would be flexibility in the concept of "simultaneous". At the pretrial hearing on that date, Mr. Jansen, referring to an Order of the Court on the subject, stated (R. p. 273):

> "But the order does make explicit that, come October 30, no less than three cases and no more than three cases — assuming there are three left—will commence between October 30 and December 18.
>
> That is the *flexible* feature. The specific feature is the fact that these three cases will go forward on an *approximately* simultaneous

6. The Court rejected the suggestion made at that time by Mr. Ferguson that there should be four trials. R. p. 286-287.

> basis, as your Honor's letter of December, 1966 indicated, and this fact and this obligation is now clearly and unequivocally known to American." (Italics supplied)

Next we come to the argument (Pet. p. 13) that multiple trials will require the utilization of attorneys who have not taken part in certain discovery proceedings. The specious nature of this argument is demonstrated by the fact that rarely, if ever, have all of Petitioner's staff attended Pretrial hearings and discovery proceedings. Moreover, Petitioner has known since November 1966 that there would probably have to be multiple trials, and neither the Courts nor Plaintiff-Respondents should be put to indefinite delay because of Petitioner's lack of diligence. And finally, Petitioner already has a staff large enough to permit the attendance, at overlapping trials, of one or more attorneys who have participated in Pretrial proceedings. (See *infra,* p. 19-20.)

The real and only problem in these cases is that one attorney, or one set of attorneys, demands the right to conduct every trial, no matter how many will be required and no matter what effect this demand may have upon the rights of others and the orderly administration of Justice. What is worse, they apparently demand the right to conduct other unrelated litigation at the same time! On December 14, 1966, Mr. Jansen represented to the Court (R. p. 251):

> ". . . it was my conclusion that to properly defend these cases, as I have done for example for Texaco in the past, a person must live these cases and these cases alone. One man in my judgment, if it please the Court, who devotes his entire time and efforts—sleeping and waking hours—all of that to these cases can do a

lot more and accomplish much more and I have learned this in twenty years of experience in anti-trust cases, when you have three or four men who have other obligations to other clients.

This is my purpose, if God gives me the strength and the endurance and a long enough life to do it. I am pleading with your Honor to give me an opportunity to do the job that I think I can do for my client. Thank you.

THE COURT: I will take your plea under consideration along with that of other parties involved."

At the very moment that Mr. Jansen was making this statement about devoting all of his "sleeping and working hours" to these cases, and no others, he was in fact involved in other and different litigation in the Central District of California, and he was being assisted by one of the firms associated with him in these cases. See *Industrial Building Materials v. Interchemical Corporation* (C.D. Calif.) 278 F. Supp. 938, decided December 26, 1967.[7] Mr. James Sullivan, who has been an active counsel for Petitioner, has also participated in other and unrelated litigation.[8]

Also, during 1968, Mr. Jansen and some of his associates have participated in litigation pending in other District Courts and not related to this Petition, but based on similar claims and involving the same industry.

Despite the absences of Mr. Jansen and Mr.

7. The case is now on appeal. See Notice of Appeal, Appendix A.

8. In February 1965 Mr. Sullivan became involved in *Herrman v. Texaco, Inc.*, a case filed in the United States District Court for the Western District of Washington, Civil Docket No. 6375. Mr. Sullivan participated in the trial of the case, which commenced on or about May 22, 1968 and continued through June 29, 1968. See Appendix B.

Sullivan, pretrial preparation of these cases continued. Some of the work has been carried on by Mr. Sullivan, some by a San Diego firm which became associated in the cases in early 1967, and some by a New York firm which became associated at least as early as October 1967.

C. There are compelling reasons for the setting of trial dates, despite the fact that the trials might overlap. (Answer to p. 16-19 of Petition).

The principle reason for setting these cases for trial, whether or not some portions of the trials might proceed concurrently, is that the cases are ready for trial, and the orderly administration of justice and fairness to the Plaintiffs require that they be disposed of with reasonable expediency and without indefinite delay caused by the capricious demand of an attorney who wants to personally conduct the trial of each case. Even in criminal cases, a defendant may not insist upon personal choice of counsel, where the effect would be to interfere with and obstruct the administration of justice. *Majeske v. U.S.*, 266 F. 2d 942 (9 Cir. 1959); *Williams v. U.S.*, 203 F. 2d 85 (9 Cir. 1963) Cert. Denied 345 U.S. 1003; In *United States v. Arlen*, 252 F. 2d 491 (2 Cir. 1958).

It is correct that Petitioner has suggested alternative trial plans. One proposal was that there be one single trial for all of the 300-plus Plaintiffs in the 27 separate actions. Another proposal was to sever the liability and damage issues, a plan which would leave the element of impact somewhere in limbo. These proposals are manifestly impractical. Nevertheless, they were patiently and carefully evaluated by Judge Pence. Alternative suggestions

made by Plaintiff-Respondents were also considered and rejected. It is most unfair to assert that Judge Pence "acceded" to the wishes of Respondents, because the plan which Petitioner complains of was originated by Judge Pence himself, not by Respondents. (*supra*, p. ....)

Petitioner says (Pet. p. 17) that seriatim trials would not involve unconscionable delay. Eight to twelve weeks is a reasonable estimate for the duration of one of these trials. At this rate, some of the Plaintiffs might be required to wait two more years for trial of cases which were filed in late 1964. Some Plaintiffs, whose cases might not be appropriate for consolidation, might have a waiting period of three years. And seriatim trials would establish an awkward precedent for subsequent trial Judges to confront.

It is outrageous to argue that Judge Pence is attempting to force Petitioner to settle these cases. That this argument is based upon a mere "inference" (Pet. p. 17) makes it even worse. Counsel's obsessive persistence to play the lead in all three acts should not be utilized as a weapon against Judge Pence.

II. The Questions Raised by the Petition Are Not Properly Before the Court. (Answer to p. 20-22 of Petition).

Assuming that more than one trial will be scheduled, the commencement dates are as yet undetermined; and while there may be overlapping of trials, the extent of the overlapping, if any, can not now be determined and the logistic problems cannot yet be evaluated. The problems urged by Peti-

tioner, if any problems really do exist, are purely speculative and highly exaggerated. For example, there is not the slightest basis for the statement (Pet. p. 21) that "the two consulting trial Judges are in full sympathy with the concept of simultaneous trials." This assertion by Petitioner is fabrication.

As the Court of Appeals pointed out, the Order involved in this Petition is not in any sense a final Order, and it can be modified, changed and qualified should there be any good reason for doing so.

The Petitions are, therefore, premature. See *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1942); *Cobbledick v. United States,* 309 U.S. 323 (1939).

CONCLUSION

Both the Petition and the Alternate Petition should be denied.

Respectfully submitted,

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